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In the Supreme Court of the United States

OCTOBER TERM, 1968

No.

UNITED STATES OF AMERICA, APPELLANT

v.

HENRY PRESTON COVINGTON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court dated March 27, 1968, dismissing the indictment (App. A. 11-18, *infra*) is reported at 282 F. Supp. 886. The opinion dated May 6, 1968, denying reconsideration (App. B. 19-20, *infra*), is not reported.

JURISDICTION

The order of the district court, dismissing the indictment on the ground that prosecution under the

statute (26 U.S.C. 4744 (a) (1)) would either violate the privilege against self-incrimination or fall outside the terms of the statute, was entered on May 6, 1968. Notice of appeal to this Court was filed on June 4, 1968. The original decision of the district court sustained appellee's plea that the prosecution was barred by his privilege against self-incrimination (App. A. 18, *infra*). On the government's motion for reconsideration, the district court held alternatively (App. B. 19, *infra*) that the statute did not authorize the indictment in this case. The jurisdiction of this Court rests on 18 U.S.C. 3731, which authorizes the government to take a direct appeal from a decision sustaining a plea in bar, see *United States* v. *Blue*, 384 U.S. 251, 253-254, as well as from a dismissal of an indictment where the decision is based upon the construction of the statute on which the indictment is founded, see *United States* v. *Fabrizio*, 385 U.S. 263, 266.

QUESTIONS PRESENTED

1. Whether the provision of the Marihuana Tax Act (26 U.S.C. 4744(a)(1)) prohibiting the acquisition of marihuana by one who has not paid the tax imposed by 26 U.S.C. 4741(a)(2) impinges upon the privilege against self-incrimination when the statute is construed and applied as not permitting pre-payment of the tax by those whose handling of marihuana would violate state law.

2. Whether Congress has authorized prosecution under 26 U.S.C. 4744(a)(1)—punishing the acquisition of marihuana by one who has failed to pay the

tax imposed by 26 U.S.C. 4741(a)(2)—when the defendant could not have pre-paid the transfer tax because not lawfully entitled to register as a marihuana handler.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations (26 U.S.C. 4741, 4742, 4744, 4751, 4753; 26 C.F.R. 152.22, 152.23, 152.66-152.68) are set forth in Appendix C, *infra*, 21-27.

STATEMENT

Appellee was charged in a one count indictment with violating 26 U.S.C. 4744(a)(1) by obtaining 737.1 grams of marihuana without having paid the transfer tax imposed by 26 U.S.C. 4741(a).[1] On appellee's motion, the trial court dismissed the indictment on the ground that under the principles ex-

[1] Section 4741(a) imposes transfer taxes at two rates. Subparagraph (a)(1) imposes a $1 per ounce tax on all marihuana transfers to persons who are registered under the terms of Sections 4751-4753; subparagraph (a)(2) imposes a $100 per ounce tax on transfers to non-registered persons.

Although the indictment is not explicit, it has been assumed by all parties that appellee was not registered under the provisions of 26 U.S.C. 4751-4753 (App. C. 22-24, *infra*). Moreover, under 26 U.S.C. 7491, in the absence of proof to the contrary, a defendant is presumed not to have complied with the registration provisions of the Act.

If he had been registered, then there clearly could be no possible violation of the privilege against self-incrimination, since federal registration is conditioned upon a showing that the activity or business to be conducted by the registrant is lawful where conducted. See 26 C.F.R. 152.22, 152.23 (App. C. 24-26, *infra*.).

pressed in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85, his privilege against self-incrimination constituted a complete defense to the prosecution (App. A. 14-17, 18). On motion for reconsideration, the government urged that the Marihuana Tax Act, and particularly the acquisition provisions under which appellee was indicted, do not, as administratively construed and applied, compel any incriminating disclosures, since persons who are not registered or registrable are not allowed to pre-pay the tax and obtain an order form to sanction the transfer of marihuana. The government argued that, under this construction, the statute operates simply as a bar to certain conduct—*i.e.*, the acquisition of marihuana by one who is not registered and cannot lawfully register—and thus in no sense touches upon the values protected by the privilege against self-incrimination. At that juncture, the district court alternatively ruled that if appellee could not, as urged by the government, pay the tax, there was no basis for the indictment (App. B. 19).

THE QUESTIONS ARE SUBSTANTIAL

1. The decision of the district court bars criminal enforcement of an important federal statute that has been the basis of hundreds of prosecutions over a period of thirty years and has been sustained against other challenges to its validity. See *United States* v. *Sanchez*, 340 U.S. 42. In *Leary* v. *United States*, No. 65, this Term, this Court will be considering the relation between the Fifth Amendment's privilege against

self-incrimination and a companion section of the marihuana control laws, 26 U.S.C. 4744(a)(2), prohibiting the transportation of marihuana by a person who has failed to pay the tax imposed under 26 U.S.C. 4741(a)(2).[2] We shall argue more fully in *Leary* that the transfer provisions of the Marihuana Tax Act—including the provision under which appellee was indicted—have consistently been interpreted by the agencies entrusted with administration of the Act (the Internal Revenue Service and the Bureau of Narcotics) *in pari materia* with the Harrison Anti-Narcotic Act of 1914 (now 26 U.S.C. 4701-4736), so that transfers to non-registered persons are completely prohibited.[3] Our position is that, in light of this administrative interpretation and application, prosecution of an unregistrable person for nevertheless obtaining marihuana does not violate the privilege. The present case involves a question of statutory construction similar to that presented in *Leary*.

2. The district court, on motion for reconsideration, disputed this construction. It recognized that the administrative construction—that in these circumstances the Act constitutes a direct ban on mari-

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[2] Section 4744(a)(2) was added to the Marihuana Tax Act as part of the Narcotic Control Act of 1956 in order to facilitate the proof of venue. See S. Rep. No. 1997, 84th Cong., 2d Sess. 8 (1956).

[3] Under the Harrison Act, 26 U.S.C. 4705(a) provides that transfers of narcotics must be made pursuant to an order form given by the transferee to the transferor. Subsections 4705(f) and (g) expressly provide that such forms will be given only to those who are registered and only for use in connection with a "lawful" business or "legitimate" profession. See *United States* v. *Doremus*, 249 U.S. 86; *Nigro* v. *United States*, 276 U.S. 332.

huana handling—would prevent a conflict with the privilege against self-incrimination, but the court concluded that such a construction would be inconsistent with the congressional intent and the statutory language.

Although Congress did not use explicit terms, such as those used in the Harrison Act, to prohibit the transfer of marihuana to non-registered persons, the agencies involved have from the outset administered the Marihuana Tax Act as so intended and limited. The regulations promulgated shortly after the Act was passed contained the basic provisions underscoring this construction. See 2 Fed. Reg. 2054 (October 1, 1937). Under the regulations, following the statutory plan, the transfer tax is payable in conjunction with the obtaining of the order form which a transferee must issue to the proposed transferor to authorize the transaction. 26 U.S.C. 4741(b) (App. C. 21, *infra*); 26 C.F.R. 152.63. For more than thirty years, however, the regulations have provided for the issuance of order forms only to registrants, since the application for the order form, which is to accompany the tendered transfer tax, must be signed by the same person who signed the application for registration (or by a person authorized by a previously filed power of attorney to act on the registrant's behalf). 26 C.F.R. 152.66, 152.67 (App. C. 26-27). Unless the district director is satisfied that the signature on the application for the order form is authentic, it will not be honored. 26 C.F.R. 152.68 (App. C. 27). And since 1964 the regulations have made express what had always been re-

garded as implicit, namely, that only one who after investigation is found to be legally qualified and entitled under local law to engage in the activities for which registration is sought, will be allowed to register. 26 C.F.R. 152.22, 152.23 (App. C. 24-26).

The result of this administrative application of the statute is that only those who would, by definition, not be incriminating themselves are allowed to engage in marihuana transactions. As to all others, like appellee, the federal statute stands simply as a prohibition; the prohibition is unrelated to any disclosure of information, for the agencies do not expect disclosure by such persons and would treat any attempt to pre-pay the transfer tax and to obtain an order form as irrelevant and meaningless under the Act.

In substance and effect, the Marihuana Tax Act operates like any statute regulating the eligibility for carrying on a trade or profession. Thus, a charlatan with only a tenth-grade education could not invoke the privilege against self-incrimination to defeat a prosecution for practicing medicine without a license, by arguing that if he were to have applied for authority he would have disclosed something incriminatory—like the intention to practice medicine though unqualified, or perhaps a link to previous, unauthorized practice. He, like appellee, is not within the class eligible to comply with statutory criteria, and he, like appellee, has no privilege to go forward and engage in unauthorized activities.

3. Contrary to the view of the court below, this long-standing administrative construction is both con-

sistent with the language and purposes of the Act and with the present indictment. The district court was apparently troubled by the words in Section 4744(a) which speak of "any person who is a transferee required to pay the transfer tax imposed by section 4741(a)". The government is not arguing, and the agencies have never found, that unregistrable individuals like appellee are not subject to the transfer tax; the government's position is only that such persons cannot *pre*-pay the tax and obtain an order form to sanction the transaction. But if the transfer is consummated nevertheless, it is a taxable transaction for which the transferee is civilly (as well as criminally) liable.

This construction is fully warranted by the purposes of the Act. In explaining the bill both the Senate and the House Committees stated:

> * * * the bill is designed, through the occupational tax and order-form procedure, to publicize *legitimate* dealings in marihuana *and through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses* [emphasis added].[4]

From this language, it is clear that Congress manifested a dual purpose: first, to "publicize" "legitimate" transfers of marihuana; and second, to "prevent" transfers to non-registered persons—*i.e.*, "those who [would] put [marihuana] to illicit uses"—by imposing a prohibitive tax and punishing those who acquire marihuana without paying this tax.

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[4] S. Rep. No. 900, 75th Cong., 1st Sess. 3 (1937); H. Rep. No. 792, 75th Cong., 1st Sess. 2 (1937).

While Congress could have used the same language as in the Harrison Act to express this intention, the indirect method adopted by Congress for achieving this result is readily understandable. At the time the Marihuana Tax Act was enacted in 1937, not all of the states had meaningful laws against the illicit handling of marihuana. See Bureau of Narcotics, *Report on the Traffic in Opium and Other Dangerous Drugs for the Year Ended December 31, 1936*, p. 58. The Congress of 1937 may have thought it appropriate to avoid such a direct, categorical ban, while at the same time providing the substance and machinery for that result. Before long, however, all the states had adopted comprehensive legislation regulating the transactions in marihuana. In that context, the administrative construction that the transfer tax could not be pre-paid by, and order forms issued to, those not registrable as entitled to carry on the activities under state law brought about the result favored by Congress—an absolute federal prohibition on marihuana transfers for other than medical, scientific, or industrial purposes. See *United States* v. *Sanchez*, *supra*, 340 U.S. at 44. This practice comports with the expressed purpose of Congress to keep the drug from the illicit market. Cf. *United States* v. *Doremus*, *supra*, 249 U.S. at 94. Prosecution of unregistered and unregistrable persons who acquire marihuana violates neither the privilege against self-incrimination nor the purpose of the statute.

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted.

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AUGUST 1968.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Criminal No. 9041

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HENRY PRESTON COVINGTON, DEFENDANT

OPINION AND ORDER

Defendant is charged by indictment with being a transferee of and acquiring a quantity of marihuana without having paid the tax imposed by law, in violation of Title 26, United States Code, Section 4744 (a) (1).

Following his plea of not guilty upon arraignment, defendant filed a motion to dismiss the indictment. In its consideration of this motion, the Court has had the assistance of the supporting and contra memoranda.

Title 26, United States Code, Section 4741 (a) provides:

> (a) Rate.—There shall be imposed upon all transfers of marihauna which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:
>
> > (1) Transfers to special taxpayers.—Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof. . . .

Section 4742, which forms the basis for determining taxable transfers, provides:

(a) General requirement.—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(b) Exceptions.—Subject to such regulations as the Secretary or his delegate may prescribe, nothing contained in this section shall apply—

(1) Professional practice.—To a transfer of marihuana to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, in the course of his professional practice only: Provided, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such marihuana transferred, showing the amount transferred and the name and address of the patient to whom such marihuana is transferred, and such record shall be kept for a period of 2 years from the date of the transfer of such marihuana, and subject to inspection as provided in section 4773.

(2) Prescriptions.—To a transfer of marihuana, made in good faith by a dealer to a

consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753: Provided, That such prescription shall be dated as of the day on which signed and shall be signed by the psysician, dentist, veterinary surgeon, or other practitioner who issues the same: Provided further, That such dealer shall preserve such prescription for a period of 2 years from the day on which such prescription is filled, so as to be readily accessible for inspection by the officers, employees, and officials mentioned in section 4773.

(3) Exportation.—To the sale, exportation, shipment, or delivery of marihuana by any person within the United States, any Territory, the District of Columbia, or any of the insular possessions of the United States, to any person in any foreign country regulating the entry of marihuana, if such sale, shipment, or delivery of marihuana is made in accordance with such regulations for importation into such foreign country as are prescribed by such foreign country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) Government and state officials.—To a transfer of marihuana to any officer or employee of the United States Government or of any State, Territorial, District, county, or municipal or insular government lawfully engaged in making purchases thereof for the Department of Defense, the Public Health Service, and for Government, State, Terri-

> torial, District, county, or municipal or insular hospitals or prisons.
>
> (5) Certain seeds.—To a transfer of any seeds of the plant Cannabis sativa L. to any person registered under section 4753. . . .

Failure to pay the tax imposed is a violation of Title 26, United States Code, Section 4744(a)(1):

> (a) Persons in general.—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—
>
> (1) To acquire or otherwise obtain any marihuana without having paid such tax. . . .

The basis of defendant's motion is the allegation that the foregoing statutory scheme is, at least as to him, violative of the Fifth Amendment to the United States Constitution in that it requires a person to incriminate himself.

What has evidently prompted this motion is a group of decisions recently entered by the United States Supreme Court. *Marchetti* v. *United States*, 36 U.S.L. Week 4143 (Jan. 29, 1968); *Grosso* v. *United States*, 36 U.S.L. Week 4150 (Jan. 29, 1968); *Haynes* v. *United States*, 36 U.S.L. Week 4164 (Jan. 29, 1968). In these cases it was determined that criminal prosecutions under the statutes imposing the annual occupational tax on gamblers,[1] the requirement to register before engaging in the business of accepting wagers,[2] the excise tax on wagering,[3] and a criminal

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[1] Title 26, United States Code, Section 4411; *Marchetti*.

[2] Title 26, United States Code, Section 4412; *Marchetti*.

[3] Title 26, United States Code, Section 4401; *Grosso*.

penalty on possessors of "unregistered firearms"[4] were each subject to an absolute defense in the form of an assertion that the statute was unconstitutional inasmuch as each one had the effect of compelling the respective defendants, and others similarly situated, to incriminate themselves. The questioned statutes required disclosure of past, present or prospective activities in areas "permeated with criminal statutes." *Marchetti, supra.* Compliance with any of the statutory requirements were directed at persons inherently suspect of criminal activities and created real, appreciable and substantial hazards of self-incrimination. *Ibid.* The hazards were particularly emphasized by the further statutory requirement that a list of all such taxpayers be made available for public inspection. Title 26, United States Code, Section 6107.[5]

A reading of the statutory tax scheme presently in question discloses that it, like those previously declared "unconstitutional," raises more than merely imaginary hazards of self-incrimination. The hazards here are likewise real, appreciable and substantial, and the statutory requirements, with the many exclu-

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[4] Title 26, United States Code, Section 5851; *Haynes.*

[5] That section provides that:

> In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E with respect to a trade or business carried on within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged.

sions, are primarily directed at those who are inherently suspect of criminal activities.[6] Again, as was

[6] In Ohio, criminal penalties are provided for persons who are subject to the taxing provisions herein questioned. Ohio Rev. Code, §§ 3719.01-3719.36, 3719.99 (1953). Similar statutes prevail in other jurisdictions. See, e.g., Ala. Code, Tit. 22, §§256-258 (1958); Alaska Stat. §§17.10.010-17.10.240 (1962); Ariz. Rev. Stat. §§ 36-1001-36-1024 (1956); Ark. Stat. §§ 82-1001-82-1024 (1947); Cal. Health and Safety Code, §§ 11001-11853 (1964); Colo. Rev. Stat. §§ 48-6-1 - 48-6-22 (1953); Conn. Gen Stat. §§ 19-244 - 19-268 (1958); Del. Code Ann., Tit. 16, §§ 4701-4722 (1967); Fla. Stat. Ann. §§ 398.01-398.23 (1963); Ga. Code Ann. §§ 42-801 - 42-822, 42-9917 - 42-9919 (1957); Hawaii Rev. Laws §§ 52-10 - 52-39 (1955); Idaho Code §§ 37-2301 - 37-2323 (1957); Ill., S.H.A., c. 38, §§ 22-1 - 22-49 (1964); Ind. Stat. Ann. §§ 10-3519 - 10-3550 (1956); Iowa Code Ann. §§ 204.1-204.25 (1946); Kan. Stat. Ann. c. 65, Art. 25 (1963); Ky. Rev. Stat. §§ 218.010-218.240 (1962); La. Stat. Ann. 40:961-40:984 (1951); Me. Rev. Stat. Ann., Tit. 22, §§ 2361-2380 (1964); Md. Ann. Code, Art. 27, §§ 276-306 (1957); Mass. Ann. Laws, c. 94 §§ 197-217D (1957); Mich. Comp. Laws Ann. §§ 335.51-335.77 (1961); Minn. Stat. Ann. §§ 618.01-618.25 (1963); Miss. Code Ann., Tit. 25, c. 2 (1942); Mo. Rev. Stat. Ann., c. 195 (1959); Mont. Rev. Codes Ann. §§ 54-101 - 54-128 (1947); Neb. Rev. Stat. §§ 28-451 - 28-472.01 (1943); Nev. Rev. Stat. § 453.010 (1963); N.H. Rev. Stat. Ann., c. 318-A, §§ 1-26 (1964); N.J. Rev. Stat. Ann., Tit. 24, c. 18 (1940); N.M. Stat. §§ 54-7-1 - 54-7-51 (1953); N.Y. Pub. Health Law, Art. 33 (1953); N.C. Gen. Stat., c. 90, Art. 5 (1958); N.D. Cont. Code Ann. §§ 19-03-01 - 19-03-32 (1960); Okla. Stat. Ann., Tit. 63, §§ 466-469A (1963); Ore. Rev. Stat., Tit. 37, c. 474 (1967); Pa. Stat. Ann., Tit. 35, §§ 780-1 - 780-31 (1964); R.I. Gen. Laws Ann. §§ 21-28-1 - 21-28-66 (1956); S.C. Code Ann. §§ 32-1461 - 32-1495 (1962); S.D. Code, Tit. 22, §§ 1301-1324 (1939); Tenn. Code Ann. §§ 52-1301 - 52-1323 (1966); Tex. Pen. Code Ann., Art. 725b (1961); Utah Code Ann. §§ 53-13a-48 (1953); Vt. Stat. Ann., Tit. 18, §§ 4141-4163 (1959); Va. Code Ann., Tit. 54, §§ 487-519 (1950); Wash. Rev. Code §§ 69.33.220-69.33.960 (1959); W.Va. Code Ann. §§ 16-8A-1 - 16-8A-26 (1961); Wis. Stat. Ann. §§ 161.275 (1957); Wyo. Stat. Ann., Tit. 35, §§ 348-371 (1957).

the case of persons who complied with the statutes challenged in *Marchetti, Grosso,* and *Haynes,* those who pay the tax imposed by § 4741(a) are subject to having their names published in a list made available to interested prosecuting authorities by virtue of § 6107.[7]

As in the recent Supreme Court trilogy, this Court must also consider the relevance of the "required records" doctrine of *Shapiro* v. *United States,* 335 U.S. 1 (1948). The same elements which served to distinguish the situations of those cases from that of *Shapiro* are present in the instant matter. Stated otherwise, defendant was "required simply to provide information, unrelated to any records which he may have maintained," there were no "public aspects" to the information sought, and the requirements here are directed to a "selective group inherently suspect of criminal activities." *Marchetti; Albertson* v. *SACB,* 382 U.S. 70, 79 (1965); *Shapiro.* Similarly distinguishable is *United States* v. *Sullivan,* 274 U.S. 259 (1927).

Finally, as in *Marchetti, Grosso,* and *Haynes,* this Court does not feel it within its province to engraft immunity restrictions[8] on the tax system in question here. Congress has made it quite clear that disclosure of marihuana transfer tax payments is to be made to prosecuting authorities. § 6107. See also, *United States* v. *Sanchez,* 340 U.S. 42 (1950). It is for the legislature, rather than the judiciary, to make new law; the judiciary can only say whether a statutory

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[7] See, *United States* v. *Sanchez,* 340 U.S. 42 (1950), as to the obviousness of the Congressional intent to aid in the regulation of the illicit traffic in marihuana.

[8] See *Murphy* v. *Waterfront Comm'n.,* 378 U.S. 52 (1964), as an example of immunity restrictions imposed within the province of the judiciary.

enactment of legislative intent, or its enforcement, in a particular instance, is constitutionally permissible.

WHEREFORE, the Court determines that the defendant has properly asserted the constitutional privilege against self-incrimination as a total defense to prosecution in this case. However, the Court also feels compelled to add that nothing determined herein serves as a holding that the marihuana tax provisions are unconstitutional or that the states may not continue to enforce their statutes prohibiting the sale, possession, etc., of marihuana. As to the application of the federal tax provisions, their enforcement through penalties may continue against persons not confronted by real, appreciable or substantial hazards of self-incrimination, or persons who are otherwise outside of the privilege's protection.

The motion to dismiss the indictment is GRANTED.

/s/ JOSEPH P. KINNEARY
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Criminal No. 9041

UNITED STATES OF AMERICA, PLAINTIFF

vs.

HENRY PRESTON COVINGTON, DEFENDANT

ORDER

This matter is before the Court on the motion of the United States for reconsideration of the Court's order of March 27, 1968, dismissing the indictment.

The memorandum filed in support of this motion submits that a person who is a transferee of marihuana in violation of state laws will not be issued an order form for marihuana. It is asserted that this rids the statute of any trace of unconstitutionality. This Court did not decide that the marihuana taxing provisions are in themselves unconstitutional; it merely determined that, as applied to this defendant, they would be unconstitutional.

If defendant had no obligation to pay the tax and obtain an order form, the United States had no basis on which to seek an indictment. The Court does not agree that Section 4744 (the statute under which defendant was indicted) is now an absolute prohibition. Section 4744 is based explicitly on Section 4741 (a). If 4741(a) is not applicable to defendant, then there is no basis for the indictment. Therefore, in any event, the indictment should be dismissed.

WHEREUPON, the Court determines that defendant's motion was properly granted, and the dismissal of the indictment shall stand as the Order of the Court.

/s/ JOSEPH P. KINNEARY
United States District Judge

APPENDIX C

STATUTES—Marihuana Tax Act of 1937, now 26 U.S.C. 4741, *et seq.*, provides in relevant part:

26 U.S.C. 4741:

(a) Rate.

There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers.

Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.

Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) By whom paid.

Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

26 U.S.C. 4742:

(a) General requirement.

It shall be unlawful for any person, whether or not required to pay a special tax and register

under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

26 U.S.C. 4744:

(a) Persons in general.

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741 (a).

26 U.S.C. 4751:

Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities, and thereafter on or before July 1 of each year, pay the following special taxes respectively:

(1) Importers, manufacturers, and compounders.

Importers, manufacturers, and compounders of marihuana, $24 a year;

(2) Producers.

Producers of marihuana (except those included within paragraph (4)), $1 a year, or fraction thereof, during which they engage in such activity;

(3) Physicians, dentists, veterinary surgeons, and other practitioners.

Physicians, dentists, veterinary surgeons, and other practitioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, $1 a year, or fraction thereof, during which they engage in any of such activities;

(4) Persons engaged in research, instruction, or analysis.

Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, $1 a year, or fraction thereof, during which he engages in such activities;

(5) Persons not otherwise taxed.

Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, $3 a year: *Provided*, That any person who has registered and paid the special tax as an importer, manufacturer, com-

pounder, or producer, as required by paragraphs (1) and (2), may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by him without further payment of the tax imposed by this section;

(6) Millers.

Any person who at a mill manufactures or produces from the plant Cannabis sativa L. any fiber or fiber products, $1 a year, or fraction thereof, during which he engages in such activities.

26 U.S.C. 4753:

(a) In general.

Any person subject to the tax imposed by section 4751 shall, upon payment of such tax, register his name or style and his place or places of business with the official in charge of the internal revenue district in which such place or places of business are located.

REGULATIONS—Title 26, Code of Federal Regulations provides in relevant part:

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Subpart C—Special Taxes
REGISTRATION

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§ 152.22 Investigation of applicants other than millers.

(a) All new applications on Form 678 shall be referred by the district director to the appropriate narcotic district supervisor for investigation, re-

port, and recommendation. Renewal applications on Form 678 shall also be referred by the district director to the appropriate narcotic district supervisor for investigation, report, and recommendation, if the district director is in doubt as to the applicant's being lawfully entitled to engage in the activity for which he seeks registration. The provisions of this section shall not apply in the case of any application to which the provisions of § 152.21 apply.

(b) In the case of applications which have been so referred, the district director shall not issue a special tax stamp in connection with any registration until information has been submitted to him, by the narcotic district supervisor, that the applicant is properly licensed or otherwise lawfully entitled to engage in the activity in the internal revenue district in which he seeks registration.

(c) All applications for registration that are referred to the narcotic district supervisor shall be returned by him to the district director with recommendation for approval or disapproval and, in case of disapproval, with a statement annexed concerning applicant's lack of license or qualification, to lawfully engage in the activity for which registration is sought. The application together with any required statement shall be returned to the district director within 10 days from date of receipt of the application by the supervisor, unless a longer time shall be required within which to complete an investigation. In the latter event the district supervisor shall, upon or before the expiration of the said 10-day period, so notify the district director stating the estimated additional time required.

§ 152.23 Evidence of qualification.

The application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought.

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Subpart D—Transfer Taxes

Rates of Tax

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Order Forms

§ 152.66 Written order required for transfer of marihuana.

Except as otherwise provided, every person seeking to obtain marihuana shall make application on Form 679a (Marihuana) to the district director of internal revenue for the district in which the transferee is located for the purchase of an order form. The application shall show (a) the transferee's name, address, and, if registered, the registration number, (b) the name and address of the transferor, and (c) a description, including quantities, of the desired articles or materials to be transferred. The application must be accompanied by a check, cash, or money order in payment of the transfer tax (see § 152-.62), plus 2 cents in payment for the order form.

§ 152.67 Signing of application.

Generally, applications for order forms shall be signed by the same person or persons signing the application for registration (see § 152.25). However, when it is impracticable for the person signing the application for registration to sign the applications for order forms they may be

signed by another person, provided a power of attorney authorizing such other person to sign the applications for order forms has previously been filed with and approved by the district director. The power of attorney shall be executed on Form 1315, or a substantially similar form, in the same manner as applications for registration, shall show the signature of the person thereby authorized to sign applications for order forms, and shall affirm that the signature so shown is his signature.

§ 152.68 Signatures to be compared.

Upon receipt by the district director of an application for an order form the signature on such application shall be compared with that appearing on the application for registration or in the power of attorney (see § 152.67). Unless the district director is satisfied that the application is authentic it will not be honored.

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